

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA
Plaintiff,

v.

BEN HARDY, et al.,
Defendants.

Civil Action No.
90-0695-L(J)

and

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
Plaintiff,

v.

BEN HARDY, et al.,
Defendants.

Civil Action No.
90-0792-L(M)

AFFIDAVIT OF BEN B. HARDY

Ben B. Hardy, after being duly sworn, states:

1. In accordance with the provisions of the will of Joseph C. Hofgesang which I probated in 1972 as his executor, I was appointed President of the The Hofgesang Foundation, Inc.

("Hofgesang Foundation"), a non-profit charitable foundation incorporated in 1964.

2. In 1972, I also became President of J H Realty, Inc. (initially Gernert Court, Inc., and later Jos. C. Hofgesang Sand Co., Inc.) ("J H Realty"), a company which had been owned solely by Mr. Hofgesang prior to his death.

3. The property comprising the northern tract of the Lee's Lane Landfill (the "Site") was owned by Myrtle S. Hofgesang until her death in October, 1964, by Joseph C. Hofgesang from October 1964 until his death March 10, 1972, by his estate from March 10,



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1972, until January 10, 1975, and by the Hofgesang Foundation Inc. from January 10, 1975, until now.

4. The northern tract of the Site was never permitted as a landfill.

5. During excavation and sale and removal of sand and dirt from the northern tract, in 1964 Jefferson County Planning and Zoning Commission filed suit in the Jefferson Circuit Court to prevent continued excavation without a permit, but a temporary injunction was denied and excavation was allowed to be completed to a 40 foot depth pending further action.

6. Upon completion of excavation, Hofgesang sought court approval for refilling with sanitary landfill materials, but the court denied the request and entered an Order requiring refilling with sand, gravel and other earth materials.

7. Information was supplied to the court to determine, based upon chemical analysis of Metropolitan Sewer District sludge, that such sludge qualified as "other earth materials".

8. The northern tract was completely refilled in the mid 1960's with only Metropolitan Sewer District sludge, sand, dirt, rock and other earth materials.

9. The central tract of the Site was a permitted sanitary landfill from the early 1960's until completed and approved with bond release around 1966.

10. I have no knowledge of landfilling with anything other than proper sanitary landfill materials in the central tract.

11. The southern tract of the Site was originally acquired by Kestler Sand & Gravel Company, Hoffman Kasey and Ella Swope as partners in the early 1960's and a western section thereof on the Ohio River bank was permitted to them for sanitary landfill and operated by them in competition with the Hofgesang central tract for approximately two years.

12. The Gernert Court Inc. (later Jos. C. Hofgesang Sand Co. Inc. and then J H Realty Inc.) acquired title to the southern tract on July 1, 1965, and obtained a sanitary landfill permit for a larger portion of such tract extending eastward away from the Ohio River, to be landfilled in three sections (first, the Central section, second, the Eastern section, and third, the Western section).

13. When Hofgesang died in March 1972, the Central section of the Southern tract was completed, and the Eastern section was being actively used for landfilling.

14. Jefferson County took a portion of the Southern tract for a flood wall, preventing the corporation from completing the Eastern section and forcing the corporation to obtain necessary cover material for use in the landfilling area in the Eastern section from the Western section.

15. I was contacted by letter from the Kentucky Department for Natural Resources and Environmental Protection ("Department") regarding barrels on the Southern tract as President of J H Realty with no mention of the Hofgesang Foundation.

16. Immediately upon receipt of such written contact, as counsel for J H Realty, I examined the designated barrel site and responded by letter dated March 24, 1980, that the subject drums were landfilled in the early 1960's by Kestler Sand & Gravel, and therefore I doubted any immediate danger from the rise and fall of the river and requested further information.

17. I was not familiar with the Kestler Sand & Gravel portion of the Site where the barrels were located which were the subject of the KDNREP notice.

18. I had never seen the referenced drums before receiving the notice.

19. On April 2, 1980, the Department issued an Order to Abate and Alleviate with hearing scheduled for April 11, 1980.

20. The Order also designated the Hofgesang Foundation although the drums at issue were on the southern tract which was never owned or operated by the Hofgesang Foundation.

21. Although the Hofgesang Foundation had been named a party to the proceedings, such proceedings and cleanup action involved barrels landfilled by Kestler Sand & Gravel on the southern tract in the early 1960's and did not involve the central or northern tracts, title to which were acquired by the Hofgesang Foundation in 1975.

22. The Department proved that there were 5 drums containing hazardous material and 17 drums with flash point problems which were not marked or identified.

23. There was no evidence that the 5 identified drums were spilling any contents on the ground.

24. During the course of the proceedings, as counsel for J H Realty and Hofgesang Foundation, I stated willingness to take all requested action and to cooperate fully with the Department, but indicated that if the cleanup became a major removal problem, J H Realty and Hofgesang Foundation wanted to bring in responsible parties.

25. I agreed with the attorney for the Department on the record that the barrels were first to be removed to higher ground and J H Realty would work with the Department for identification testing and removal of the drums.

26. J H Realty was instructed to work with Department personnel supervision and directions.

27. On the date of the Administrative Hearing, the attorney for the Department told me that such proceeding was statutorily required and was not appealable and that the Department must initiate actions if necessary in a court of law for enforcement.

28. After the hearing, I continued to discuss with officials of the Department questions relating to removal and relocation.

29. All discussions and proceedings between the Department and me before filing of the later action were considered and interpreted by me as interlocutory and not final or appealable.

30. The Department sought and obtained summary judgment from Franklin Circuit Court to enforce the Department Order on

the ground that such Order had not been appealed and was final and no longer appealable.

31. I was not given full information, direction, or cooperation by the Department until after the Court Order was entered.

32. J H Realty fully complied with the directions and requirements of the Department when such directions and requirements were obtained. J H Realty completed the cleanup to the satisfaction of the Department in a timely manner when sufficient direction and cooperation was provided by the Department.

33. Landfilling activities at the southern tract was conducted by Charles and Jerry Blankenship (individually and under the names Landfill, Inc. and Cherry Trucking, Inc.) between June 30, 1966, and September 25, 1972; Paul Lunch (individually and under the names Greater Landfill, Inc. and Edison Trucks, Inc.) between September 25, 1972, and July 22, 1974; and Chester McElroy between July 22, 1974, and April 3, 1975. With the exception of Chester McElroy, a salaried employee of the J H Realty, Inc. (then Jos. C. Hofgesang Sand Co., Inc.), the land was leased to these individuals and their companies in return for a percentage of the profits earned from running the landfill.

34. These operators carried out their landfilling responsibilities independent of my input and participation.

35. I have never operated or been involved in the operation of any landfill on the northern and central tracts of the Site, which are now owned by the Hofgesang Foundation.

36. After Mr. Hofgesang's death, as executor of his estate, I was involved in the operation of three businesses unrelated to the Lee's Lane Landfill operation: Crittenden Drive Salvage, Eagle Machine Co., Inc., and Knox Sanitation, located on Crittenden Drive.

37. I may have visited the landfill site and Crittenden Drive offices, or spoken with former Hofgesang employees, to address issues relating to these and other businesses, but I had nothing to do with the landfill operation.

38. Under the agreements with the independent contractors, invoicing and accounting was handled by former Hofgesang employees who continued their same practices.

39. After Mr. Hofgesang's death, Blankenship continued to operate the landfill under an existing contract.

40. As executor of the estate, I "called the shots" as Jerry Blankenship stated in his Affidavit, to the extent that I terminated the contract with Blankenship and negotiated agreements with the subsequent independent operators. But, I never had any control over the operation of the landfill.

41. As attorney for J H Realty, I handled past due accounts

42. I received correspondence and notices from the United States Environmental Protection Agency regarding activities and

proposed activities at the Site. As attorney for Hofgesang Foundation and J H Realty, I participated in numerous meetings and settlement discussions, with EPA and other potentially responsible parties ("PRP's") to discuss actions and proposed actions regarding the Site. As counsel for the Hofgesang Foundation and J H Realty, I also corresponded with and responded to information requests from EPA.

43. Hofgesang Foundation was always willing to participate with other PRP's in addressing concerns raised by EPA with respect to the Site. Because of its limited financial resources, the Hofgesang Foundation was not able to solely perform the Remedial Investigation/Feasibility Study ("RI/FS") or any other work at the Site, and no other PRP agreed to conduct the work with Hofgesang Foundation.

44. No PRP agreed to perform the RI/FS or any other work at the Site, and EPA conducted that work.


45. Since completion of work at the Site, Hofgesang Foundation has been attempting to resolve its financial responsibility, if any, in this proceeding.


Ben B. Hardy

STATE OF KENTUCKY)
)
COUNTY OF JEFFERSON)

SS:

Subscribed and sworn to by Ben B. Hardy before me on the 17th day of April, 1995.


Notary Public
Commission Expires: 12/30/95